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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Adv. Case No. 08-01789-smb

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5 SECURITIES INVESTOR PROTECTION CORPORATION,

6 Plaintiff,

7 v.

8 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

9 Defendant.

10 - - - - - x

11 Adv. Case No. 10-04898-smb

12 - - - - - x

13 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

14 MADOFF INVESTMENT SECURITIES LLC,

15 Plaintiff,

16 v.

17 SAREN-LAWRENCE,

18 Defendant.

19 - - - - - x

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1 Adv. Case No. 10-04667-smb

2 - - - - - x

3 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

4 MADOFF INVESTMENT SECURITIES LLC,

5 Plaintiff,

6 v.

7 GROSS et al.,

8 Defendants.

9 - - - - - x

10

11 United States Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

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15 March 27, 2019

16 10:01 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

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25 ECRO: TL

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1 HEARING re 08-01789-smb Conference re Settlement of Order
2 Lifting Stay on Subpoenas Issued to BLMIS Employees by
3 Chaitman LLP

4

5 HEARING re 10-04898-smb Pre-Trial Conference

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7 HEARING re 10-04667-smb Hearing on Order to Show Cause

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25 Transcribed by: Sonya Ledanski Hyde

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1 A P P E A R A N C E S :

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8 BY: DEAN D. HUNT

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17

18 BY: GREGORY M. DEXTER

19

20 ALSO PRESENT TELEPHONICALLY:

21 KEVIN H. BELL

22 DAVID J. SHEEHAN

23 JASON B. SANJANA

24 DAVID GROSS

25

1 P R O C E E D I N G S

2 THE COURT: Madoff. We'll do the matter with Ms.
3 Chaitman's clients first.

4 MR. HUNT: Your Honor, if we could hear the Saren-
5 Lawrence matter first.

6 THE COURT: Oh, yeah. Why don't you tell me
7 what's going on in that?

8 MR. HUNT: So we were all -- this is Dean Hunt for
9 the trustee, by the way. When we were all here last time
10 Ms. Chaitman asked for some time to file a (indiscernible)
11 application, we did that. Without getting into the details
12 of that settlement vehicle, the information was inadequate
13 for us to make a decision to dismiss the case. We have
14 sought some additional information, and the client, as
15 they're allowed to do, chose not to provide that.

16 So now we're back here, I guess, ready for
17 dispositive action.

18 THE COURT: Okay.

19 MR. HUNT: We would like permission to file a
20 motion for summary judgment on or before June 15th. We
21 think that we have all the information we need for summary
22 judgment and given all the other things that are going on
23 with Ms. Chaitman's cases that seems like a reasonable
24 (indiscernible).

25 THE COURT: Well, what about the allegation that

1 there was legitimate trading in the account or that there
2 was a Ponzi scheme?

3 MR. HUNT: All that can be handled by summary
4 judgment, we believe.

5 THE COURT: All right. All right. So you're
6 going to file a motion for summary judgment.

7 MR. HUNT: Yes, Your Honor.

8 THE COURT: All right. Why don't you discuss Mr.
9 Dexter or Ms. Chaitman's schedule, and if you can't agree on
10 a schedule, just make the motion.

11 MR. HUNT: Okay. Thank you.

12 THE COURT: Okay.

13 MR. DEXTER: Yes, Your honor. We'd like a little
14 bit more time with that, but we could discuss that with Mr.
15 Hunt.

16 THE COURT: I think that's the best way to deal
17 with it.

18 MR. DEXTER: Thank you.

19 THE COURT: All right. Thanks. As long as you're
20 here, let's deal with the matter of the order. So what's
21 the issue?

22 MS. FEIN: Excuse me.

23 THE COURT: What's the issue?

24 MS. FEIN: So we objected on a limited basis to
25 the order regarding the BLMIS employee subpoenas. The

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1 objection was limited to those timely served, so there are
2 29 cases with open fact discovery, we have no issue with the
3 depositions going forward in those cases. Other than
4 additional --

5 THE COURT: Other than you've objected to the
6 number of depositions.

7 MS. FEIN: And we also objected to the number of
8 depositions as well.

9 THE COURT: Let me deal with how many cases are
10 open, which was very confusing. Is there a dispute as to
11 whether discovery was or was not open in certain cases where
12 a subpoena was served?

13 MS. FEIN: There's a dispute --

14 THE COURT: What's the --

15 MS. FEIN: -- and we can certainly give you our
16 position, and we also have a chart of the cases --

17 THE COURT: Sure.

18 MS. FEIN: -- to outline that as well. And we
19 provided those Ms. Chaitman last night.

20 THE COURT: Okay. Do you have an extra copy for
21 my clerk?

22 MS. FEIN: We do.

23 THE COURT: Thanks. Okay.

24 MS. FEIN: So the first 29 entries on this chart
25 will show you the 29 cases that are open pursuant to the

1 discovery stipulation from August 2017.

2 THE COURT: Okay.

3 MS. FEIN: The next set of cases were open as of
4 the time the March 2017 subpoenas were served. And there
5 were six subpoenas served in March, as we understand it from
6 Chaitman. So for depositions to take place in those cases,
7 they should be limited to the March 2017 subpoenas that were
8 served, those six depositions because discovery closed by
9 the time any additional subpoenas were served.

10 THE COURT: Okay. So Cases 30 through 59,
11 although discovery was open when at least some deposition
12 subpoenas were served, those discovery deadlines had run by
13 the time of the August 2017 order, right?

14 MS. FEIN: That's correct.

15 THE COURT: Okay.

16 MS. FEIN: And then for the last nine cases
17 listed, those cases had discovery close at the time the
18 March 2017 subpoenas were served in the first instance.

19 THE COURT: Okay.

20 MR. DEXTER: Excuse me, Your Honor, Greg Dexter,
21 Chaitman LLP, here on behalf of the Defendants. The problem
22 with the Trustees' methodology is that they want to punish
23 for holding the subpoenas in abeyance. Your Honor may
24 recall -- and I know that Your Honor law clerk, Mr. Paek,
25 probably recalls.

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1 THE COURT: Well, he's not sitting here, I am, so
2 tell me.

3 MR. DEXTER: Okay. Well, he may recall calling me
4 on a weekend. And I think on Sunday we submitted a letter
5 to the Court agreeing to hold compliance with the subpoenas
6 in abeyance agreeing not to serve subpoenas.

7 THE COURT: That's not what happened. Because
8 I'll you exactly what happened because I read the
9 transcript. Ms. Chaitman raised the concern because this
10 was all predicated, I think, on completing Mr. Madoff's
11 deposition. She raised the concern that she would be
12 sandbagged if she waited to serve the subpoenas. And I
13 said, on the record, then serve the subpoenas, but we'll
14 just hold compliance with the subpoenas in abeyance. I
15 think that was at the May 2017 hearing. So don't tell me
16 about conversations with my clerk.

17 MR. DEXTER: Okay. The conversations with the
18 clerk are on ECF filings memorializing the conversations.

19 THE COURT: Right. So I said -- I told her to
20 serve the subpoenas, so she served them, right? That's what
21 this is all about. She served the subpoenas.

22 MR. DEXTER: Right. Well, we served --

23 THE COURT: So what's the issue?

24 MR. DEXTER: The issue is basically they want to
25 say that we shouldn't be able to take some of these

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1 depositions for these cases between 30 and 59.

2 THE COURT: You can't -- you can take depositions
3 to the extent you served subpoenas before the deadline for
4 fact discovery. But you can't take depositions based on
5 subpoenas you served after fact discovery. That's all. Why
6 is that hard to understand?

7 MR. DEXTER: Because these ones -- 30 through 59 -

8 -

9 THE COURT: Right.

10 MR. DEXTER: -- those are subpoenas that were
11 served in September 2017

12 THE COURT: But that's after fact discovery.

13 MR. DEXTER: That's after -- for months we didn't
14 know if we could serve subpoenas, we couldn't serve
15 subpoenas.

16 THE COURT: Stop. Stop. It was clear all along
17 that if fact discovery was still open, you could serve
18 subpoenas. And in May I said to Ms. Chaitman, if you're
19 worried about time running out, serve the subpoenas, but
20 hold them in abeyance.

21 MR. DEXTER: There wasn't an order entered until
22 June or July.

23 THE COURT: If you didn't know about whether you
24 could serve subpoenas, why did you serve subpoenas in
25 September in these cases?

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1 MR. DEXTER: Because Your Honor entered an order
2 in June or July of 2017, and shortly thereafter we resumed
3 serving subpoenas. So basically what happened is there was
4 not clarity for a couple of months. We didn't serve
5 subpoenas. Then we had clarity, and we served another set
6 of subpoenas. And now they're trying to punish us and say
7 that second set of subpoenas shouldn't apply to cases.

8 THE COURT: Look, I've heard about. I remember
9 well this issue; although, I don't remember a lot of things.
10 Ms. Chaitman wanted to take the depositions of traders,
11 subpoena and take depositions.

12 As I said just before and I'll say for the third
13 time, at the same time that this was going on, the parties
14 wanted to complete Mr. Madoff's deposition. And there was
15 an understanding and ultimately a stipulation that you'll
16 hold off on the expert reports, and you would hold off on
17 compliance with the subpoenas pending the completion of
18 Madoff's deposition and an order, I think it was dated
19 August -- or a stipulation order, and I think it was dated
20 August 17, 2017.

21 It was agreed between the parties that the
22 discovery deadlines would be held in abeyance except in the
23 three cases, the two Nelson cases and the Saren-Lawrence
24 case as with the submission of the expert reports. That
25 order didn't extend discovery in cases where the deadlines

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1 had already run.

2 So you can take the depositions of timely served
3 subpoenas -- timely meaning before the end of discovery, in
4 those cases, obviously, we had time to serve them. You
5 can't take the depositions of people who you subpoenaed for
6 the first time after the close of discovery.

7 MR. DEXTER: Well -- okay. We're not relying on
8 that August order. There's no dispute that we can proceed
9 with depositions in cases --

10 THE COURT: That's with Cases 1 through 29, right?

11 MR. DEXTER: That's right.

12 THE COURT: Okay. So what I said was -- and let
13 me just to finish this off, Cases 6 through 68, the
14 discovery deadlines ran long before any of this arose, and I
15 didn't extend any discovery deadlines

16 MR. DEXTER: Except I'm not sure why 67 and 68 are
17 there, if the deadlines are March 2017, and that's when we
18 served the subpoenas.

19 THE COURT: If you served the subpoenas in a
20 timely fashion, I don't know. I've been given a chart. All
21 I've said was if you served the subpoenas before the
22 discovery deadline when -- ran, then you can take those
23 depositions subject to this issue about the number of
24 depositions; although, I'm not sure if that's these earlier
25 cases in light of what I just said.

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1 MS. FEIN: One item on the deeds -- the discovery
2 deadlines that are shown here. We have representation from
3 Ms. Chaitman about when the certain March subpoenas were
4 served. And all of the subpoenas were served after March
5 13, 2017, which is the last date for Number 68 on the chart.

6 THE COURT: If that's a dispute, I'll resolve it.
7 I can't resolve it today because I don't have any evidence
8 on that. But, generally speaking, you can take the
9 depositions of those people who you subpoenaed, you served
10 your subpoenas before the discovery deadline ran out, you
11 can't depositions pursuant to subpoenas that were served
12 after the fact discovery ran out.

13 We're dealing with numbers -- maybe we should mark
14 this as an exhibit. I'll mark it as Court Exhibit 1, which
15 is the chart you gave me and receive it in evidence. So for
16 Cases 1 through 29 on Court Exhibit 1, you can take the
17 deposition subject to the numbers, which we'll take about in
18 a minute.

19 On cases 30 through 59, you can take the
20 depositions of those people who you subpoenaed before the
21 end of discovery in each case, but not with respect to
22 subpoenas served after the discovery deadline. And --

23 MR. DEXTER: Your Honor, can I just --

24 THE COURT: Let me just finish --

25 MR. DEXTER: Okay.

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1 THE COURT: -- maybe there is or isn't a dispute,
2 but assuming all the subpoenas were served after the last
3 deadline in Numbers 60 through 68 is March 13, 2017, they're
4 untimely, and you can't take the depositions in those cases.
5 Now, what did you want to say?

6 MR. DEXTER: Just two points with respect to
7 Numbers 30 through 59. Number 1, the Madoff deposition
8 order should allow these subpoenas to count in all the cases
9 because these subpoenas actually were served as a result of
10 the testimony in Madoff's deposition.

11 THE COURT: We just went through a whole
12 proceeding where the trustee was forced based upon the
13 Madoff deposition to make a motion to modify scheduling
14 orders, which for the most part, I denied. Now, without a
15 motion, you're telling me that because of some reason of a
16 Madoff deposition without any motion, I should essentially
17 extend the discovery orders in all these cases to allow you
18 to serve subpoenas. It doesn't make a lot of sense.

19 MR. DEXTER: Well, we can make a motion --

20 THE COURT: Look, you can do -- look, you can do
21 whatever you want. I don't have a motion before me. There
22 was -- by the way, there was no confusion, the April order -
23 - the August order was quite clear. The discovery deadlines
24 were held in abeyance, which doesn't mean that they were
25 extended. By the way, the Madoff deposition orders were

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1 very clear, no other discovery was extended. So you can
2 submit an order, and maybe the best thing to do is to attach
3 Court Exhibit 1 to the order so you can refer to the
4 matters.

5 Now, with respect to the number of depositions. I
6 guess, I don't know if it still applies to the Cases 30
7 through 68 in light of the determination that you're limited
8 to the subpoenas you served before the discovery deadline.
9 You tell me. Do you know offhand?

10 MS. FEIN: So I do. So for Cases 30 through 59
11 where the March 2017 subpoenas, those depositions can be
12 taken. There were only six that were served in those cases.

13 THE COURT: Okay. So that's not an issue. So
14 we're dealing with 1 through 29. How many subpoenas have
15 been served?

16 MR. DEXTER: Fourteen, your Honor.

17 THE COURT: In all those cases?

18 MR. DEXTER: Yes.

19 THE COURT: Fourteen, plus the Madoff deposition
20 is 15. Their argument is you can only take 10 without a
21 court order.

22 MR. DEXTER: Okay.

23 THE COURT: So pick your best nine, and that's who
24 you can take.

25 MR. DEXTER: Okay. Well, we have about seven --

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1 THE COURT: Now, I guess you know, it's actually
2 really academic because you can pick nine one case, and you
3 can pick nine different ones for another case, so then we'll
4 get into an evidentiary issue, I guess, but do you want --

5 MR. DEXTER: Right.

6 THE COURT: Why don't you identify those people
7 that you want in every one of the cases so you can do that
8 deposition once. I'm assuming that there are certain people
9 you want in every case.

10 MR. DEXTER: Yes.

11 THE COURT: All right. So take their deposition
12 once and just do all the cases at one time because they're
13 not going to have knowledge of individual accounts. You
14 want to ask them if they were trading securities or whether
15 securities were allocated, I assume, right?

16 MR. DEXTER: The people who have common knowledge,
17 yes, we want to ask them about things that apply --

18 THE COURT: So how many of your 14 people are
19 those or are those all of them?

20 MR. DEXTER: I think it's most of them. I don't
21 have an exact number because we've been -- we haven't been
22 able to take any discovery.

23 THE COURT: No, you can't.

24 MR. DEXTER: Right. So --

25 THE COURT: You served the subpoenas. You must've

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1 thought they had something to say, right?

2 MR. DEXTER: Right. But usually, you serve
3 subpoenas, you take discovery. That leads to more
4 discovery. But we've been put --

5 THE COURT: It's not going to lead to more
6 discovery. How do you propose, since you can take different
7 depositions in different cases, how do you propose to deal
8 with this?

9 MS. FEIN: I think it would be easiest to put in
10 the order those depositions that they wanted to take for the
11 nine that they are entitled to take and --

12 THE COURT: Well, but they're entitled to take
13 nine more in every case and they don't have to be the same
14 people in every case, right?

15 MS. FEIN: That's right. I think that at this
16 point, though, to take nine, to choose nine of the 14, I
17 mean, just looking at the list, eight of the 14 are -- had
18 the exact same job title, six of the 14 had started in 2006
19 or later --

20 THE COURT: We're saying different things. In
21 theory, they could've sent down a hundred subpoenas and
22 taken 10 different people or nine different people in each
23 of these cases. But doesn't it make more sense to just let
24 them take the 14 depositions?

25 MS. FEIN: That's what we had in our proposed

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1 order. I think that's --

2 THE COURT: You can take the 14 -- in cases 1
3 through 29, Mr. Dexter, you can take all 14 depositions,
4 okay?

5 MS. FEIN: Are you saying --

6 MR. DEXTER: Thank you, Your Honor.

7 MS. FEIN: -- but they cannot use the testimony --

8 THE COURT: Well --

9 MS. FEIN: -- the same depositions in the same
10 cases? Because the issue is --

11 THE COURT: No. No, no, no, no, no. That's going
12 to be very difficult to deal with. I mean, it's going to be
13 difficult to deal with in the other cases also, but all I'm
14 saying is since they could take -- they could take the 14
15 depositions, basically.

16 MS. FEIN: But they would only be able to use 10
17 of the depositions in each case. I mean --

18 THE COURT: Yeah, you know what, that's going to
19 be very difficult to do, so just let them take the 14. I
20 can -- I'm going to expand the list from nine to 14. They
21 can take those depositions because they can take them anyway
22 because we're dealing with 29 different cases and they can
23 take one deposition or a half a deposition in each case. So
24 you can submit an order. Settle an order or submit a
25 consensual order on that one. Okay?

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1 MR. DEXTER: Okay. Thank you, Your Honor.

2 MS. FEIN: Thank you.

3 THE COURT: All right, Mr. Gross, are you on the
4 line?

5 MR. GROSS: (Indiscernible).

6 THE COURT: Okay. It's a little hard to
7 understand you. I don't know how close you're sitting to
8 the phone or if you have it on a speaker phone.

9 MR. GROSS: I have it on a speaker phone.

10 THE COURT: It is on a speaker phone?

11 MR. GROSS: Yes.

12 THE COURT: Yeah. Could you take it off the
13 speaker phone, because it's very hard for me to hear.
14 You're coming in muffled.

15 MR. GROSS: (Indiscernible).

16 THE COURT: Okay. Okay, Mr. Gross, after I got
17 your last couple of letters --

18 MR. GROSS: Hello?

19 THE COURT: Yeah. Can you hear me?

20 MR. GROSS: I hear you. I got it off speaker. I
21 got the phone next to my ear.

22 THE COURT: Okay, good. You want to continue with
23 your arbitrations against Spring, Cohmad, and Mr. Cohen's
24 estate, is that right?

25 MR. GROSS: I -- who am I speaking to now?

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1 THE COURT: This is Judge Bernstein.

2 MR. GROSS: I'm sorry, Your Honor, I wasn't sure
3 who (indiscernible) on the phone.

4 THE COURT: Okay.

5 MR. GROSS: That is not -- what else you want to
6 know?

7 THE COURT: My understanding is you want to go
8 forward with your arbitrations at FINRA against Cohmad, Mr.
9 Spring, and Mr. Cohen's estate. Is that correct?

10 MR. GROSS: Well, not really, because for me to be
11 heard, I went to arbitration -- can I fill you in on what --
12 why I have to go to FINRA?

13 THE COURT: Sure, go ahead.

14 MR. GROSS: Okay. I was a Cohmad customer and I -
15 - which is Cohen and Madoff and I originally invested with
16 them. So now, when I get an order from BLMS that I owe
17 \$325,000, Judge, that's crazy. It doesn't make sense. So I
18 turn around and I say, I don't owe that money and in fact,
19 it cost me millions that I made a contribution. Well, I
20 finally got in touch with someone at Baker and Hostetler's
21 and I got a letter, a document. And it said -- the document
22 says I didn't become a client until June 24th, 1986, okay?
23 And I got this in correspondence. It's crazy. I've been a
24 client since 1986, not 1996. Okay?

25 And I had this letter and I (indiscernible) I

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1 said, well, what happened to all the money before this? He
2 said, I don't know from anything. I only know what we got.
3 So he says, well then, give me an accounting, who put the
4 money into BLMS and turned around, and I have that. They
5 don't answer me. They don't answer me and I ran around in
6 circles and I says -- the only answer I got, he says, if you
7 don't go along with this, the only thing, we'll audit and
8 we're going to increase the amounts. And every time you
9 object, you're going to increase the amount.

10 But I feel that I am right, so I turn around and I
11 finally got somebody to listen to me. I went to FINRA's
12 office and I got -- finally got an appointment with somebody
13 and I brought papers in showing them -- I got to get the
14 information to show them that I was a member, a BLMS
15 customer and had all that money there, but they won't listen
16 to anything that's not on their books. So I turned around
17 and I went to FINRA and they -- and I showed the things,
18 that the dates, that I have papers that was before this time
19 and whole thing and I contributed money.

20 They're ignoring all of that. So I -- so when I
21 did that, they agreed to give me the arbitration because
22 that's the only way I can prove that I was a member before,
23 because the papers I gave them, they don't listen. They
24 only look at the papers they have. So I got the
25 arbitration.

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1 From the arbitration, I understand and I was told
2 by the attorneys -- their attorneys, because I have no
3 attorney, okay -- I was told that I should settle with them
4 as save myself a lot of aggravation and the whole thing and
5 I got about three or four letters from an attorney by
6 (indiscernible), and eventually, I don't think he's working
7 there anymore, but I was -- he says, Mr. Gross, if you don't
8 go with the arbitration, we can work something out. We'll
9 (indiscernible) something.

10 I said, the only way I get an answer, thank God
11 FINRA answers. I refused to waive the arbitration. Now, I
12 understand that the arbitration is stayed until such time as
13 the Trustees -- it's all settled. I said, I'm never going
14 to live that long. I'm 92 years of age and you want me to
15 wait for Trustees to be settled.

16 So I sent correspondence and when I sent the
17 correspondence, I give a date showing that I was there
18 before and I had monies there, millions. Not
19 (indiscernible) hundred. I can account for at least an
20 additional million. Because when they started in 1986, I
21 got a check. I gave them \$100,000 to start --

22 THE COURT: Mr. Gross? Mr. Gross --

23 MR. GROSS: -- with people from Cohmad.

24 THE COURT: Mr. Gross, let me --

25 MR. GROSS: Everybody was (indiscernible) back in

Page 23

1 those days. I worked hard and whatever happened, I finally
2 got an okay of the FINRA arbitration. Now, what I was
3 doing, because I had illness and all of that since, I turned
4 around and I says, I would like to know, I want to go
5 forward. I want to bring the papers. At least --

6 THE COURT: Mr. Gross --

7 MR. GROSS: -- the papers I have. I'll give you
8 dates --

9 THE COURT: Mr. Gross --

10 MR. GROSS: I got stocks, retiree program, the
11 whole thing. There's nobody to give them to. So the fact
12 that they're asking money is an artificial amount of money
13 and they said, well, we can make a settlement. I didn't --
14 I haven't got that means to make a settlement and since I'm
15 honest and I really believe honestly that I didn't come as a
16 winner and I have myself a positive attitude.

17 My positive attitude is if I'm wrong, I don't take
18 that attitude. My attitude right now, Your Honor, is that
19 if the Trustee would make an appointment with their
20 accountants and I'll bring the papers and I have -- I raised
21 a lot of papers. I have about four or five hundred sheets
22 of paper, documents showing that stocks that -- from the
23 stock market, I have stocks (indiscernible). I don't know
24 how they handled the money. They liquidated my stocks which
25 I found out it was illegal. And they put it into -- some

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1 money, but I also ask, after '96, where did they get the
2 money to open the account?

3 What did they start out with? So they show me
4 checks that I gave after that. I said, where's all the
5 money before? And --

6 THE COURT: Mr. Gross, what do you want?

7 MR. GROSS: (Indiscernible).

8 THE COURT: Mr. Gross --

9 MR. GROSS: -- (indiscernible), Your Honor.

10 THE COURT: What is it --

11 MR. GROSS: It's not that I want to have a
12 (indiscernible) or anything or make a settlement with them.
13 I want to be able to sit down with anybody from Picard's
14 people who understand what I'm trying to interpret, and I
15 don't know if I'm expressing it right or a legal term, but I
16 will come to New York. I will come anyplace. I'll bring
17 all the papers. If I'm wrong, I'll write them a check. Not
18 that I could write the check, but I -- we borrow money. I
19 got a house, I'll borrow it. But if it's ridiculous. They
20 say, why'd you make a hardship.

21 You know what? I wanted to fill it out at one
22 point. I had an attorney and the attorney -- I got a letter
23 from the attorney when he found out that I did the FINRA
24 thing because I was not getting an answer, all I was getting
25 from the attorney was bills and I worked out, I didn't get

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1 personal attention because I was going with the
2 (indiscernible) and they're going with what they have on
3 their books.

4 I can show you prior to the year that they say
5 they have my records, I'll give you thousands of dollars,
6 maybe -- by the (indiscernible), Your Honor, at one time, I
7 wrote a check probably in excess --

8 THE COURT: Mr. Gross.

9 MR. GROSS: -- million dollars in taxes. I'm
10 healthy, I'm alive. I'm very fortunate I'm speaking to you
11 because most of my friends are gone and that's -- the only
12 thing is, because I got this positive attitude, that they're
13 not entitled to that money and it's costing me. I probably
14 -- I spent \$100,000 with other attorneys in the whole thing,
15 but I probably could've given them \$100,000 and not bother
16 with anything, but I'm getting aggravated. I'm getting sick
17 over it.

18 THE COURT: All right --

19 MR. GROSS: And the only thing I can say, I heard
20 the gentleman say he wants a judgment on me. Let me tell
21 you now, I get a judgment (indiscernible) have my house.
22 But that's not the point. The point I'm trying
23 (indiscernible) is my documents don't show that I got so
24 much money prior to that. Show me how they opened up an
25 account with BLMS and the money, and, Your Honor, I talked

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1 to these people and they're only attorneys and they do what
2 they see and what they have, right.

3 They can't make up what they don't see. Okay?

4 But I said, (indiscernible) see me. I'll come to New York.
5 Give me -- they have (indiscernible) bookkeeping,
6 AlixPartners (indiscernible). He says, can't help you. We
7 only can look at BLMS records. I said, but I was a Cohmad,
8 the whole thing. He says, you don't count and everything --

9 THE COURT: Mr. Gross --

10 MR. GROSS: -- I got agreements with them, with
11 the Cohmad. Cohmad said, they take their money, they pool
12 it together, from what I understood. And what they did, I
13 don't know, Your Honor. But -- and whatever money they got,
14 they had an account they put it in because you were limited
15 at the time, you had to be a millionaire to do that. But
16 they got me in for \$100,000 when they started in 1986, and
17 let me tell you why I know the year.

18 Because the fellow had just gotten a job and some
19 relatives (indiscernible), got to help him out. He got this
20 job. See what you can do. And I signed up. And they gave
21 me such good reports, I never even looked to check. And on
22 top of that, what's even worse, they gave me an account to
23 check on them and it was their accountant which was Sosnik
24 and Bell.

25 THE COURT: Mr. Gross --

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1 MR. GROSS: (Indiscernible).

2 THE COURT: -- do you want to go forward with your
3 arbitration?

4 MR. GROSS: -- Your Honor. I would like the
5 Trustee to sit down with me with these papers and they're
6 going to find out that what I'm putting my heart out to you

7 --

8 THE COURT: Do you want to go forward with the
9 arbitration --

10 MR. GROSS: -- is a matter of --

11 THE COURT: -- Mr. Gross?

12 MR. GROSS: Not conversation. I don't want
13 conversation. Papers. I don't have all the paperwork that
14 they would've had, that if I got to arbitration, I don't
15 know if they would have it. Maybe back in '13 when I got
16 the arbitration papers, with the papers incinerating. In
17 fact, I got a wall of papers and (indiscernible) turn them
18 away.

19 THE COURT: Mr. Gross --

20 MR. GROSS: -- that far.

21 THE COURT: Mr. Gross, you have to listen to me
22 now.

23 MR. GROSS: Yes.

24 THE COURT: Do you want --

25 MR. GROSS: Okay.

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1 THE COURT: -- to go forward with your arbitration
2 in FINRA?

3 MR. GROSS: What?

4 THE COURT: Do you want to go forward with the
5 FINRA arbitration?

6 MR. GROSS: For the purpose of getting --

7 THE COURT: Do you want to go forward with the
8 FINRA arbitration? I thought you did. That's why I issued
9 the order to show cause.

10 MR. GROSS: I would -- showing cause -- I have to
11 go through with it, because the only who can back up the
12 evidence --

13 THE COURT: Okay. Okay. I'm going to hear from
14 the Trustee now. Enough. Go ahead.

15 MR. MURPHY: Good morning, Your Honor. Keith
16 Murphy, BakerHostetler, on behalf of the Trustee. Your
17 Honor entered the order to show cause on February 26 in this
18 case, directed -- in light of the Trustee's settlements with
19 Cohmad and with the estate of Maurice Cohen combining
20 precedent including Fairfield credit decision why the
21 Court's prior ruling (indiscernible) injunction should not
22 be reconsidered.

23 However, the bases, Your Honor, for the injunction
24 are still relevant today. Fairfield Greenwich decision or
25 any other binding precedent does not change that. As brief

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1 background, Your Honor, Mr. Gross had filed several claims
2 related to his two accounts with BLMIS but he was a net
3 winner but he had his fictitious profits. The Trustee denied
4 those claims and then brought an action against Mr. Gross in
5 2010.

6 THE COURT: What's the status of that action?

7 MR. MURPHY: It's an open action, Your Honor.
8 We've been attempting to confer with Mr. Gross several
9 times. We have not had great success. We have served him
10 with --

11 MR. GROSS: That's not true.

12 THE COURT: Mr. Gross, don't interrupt or I'm
13 going to mute your line and you won't be able to speak.

14 MR. MURPHY: We have sent him documents
15 (indiscernible) documents so he can review because he would
16 not have access to the electronic database. Ms. Markel in
17 my office has had numerous conversations with him in attempt
18 to meet and confer, essentially.

19 THE COURT: Let's get -- okay. I asked you the
20 question. Let's get back to the arbitration.

21 MR. MURPHY: Sure. Back to the arbitration then,
22 Your Honor. We -- Mr. Gross commenced the arbitration in
23 2013. He sued three people who were already the subject of
24 a case by the Trustee which had been commenced in 2009.
25 That was Cohmad Securities, Maurice Cohen, and Richard

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1 Spring, and he was essentially seeking the same paper
2 profits that was shown on his last BLMIS statements. That's
3 what he had passed (indiscernible) statement of claim.

4 The Court at that time entered the injunction,
5 preliminary and joint, the FINRA arbitration, "until
6 completion of the Trustee's action in Picard (indiscernible)
7 Securities Corp, et al, including the satisfaction by the
8 Cohmad defendants of any settlement or judgment by the
9 Trustee."

10 Your Honor, at this point, the Trustee has settled
11 with Cohmad and the Cohen estate but we've not yet settled
12 with Mr. Spring. But the settlements don't negate
13 continuing viability of the injunction or, frankly, our need
14 for -- with respect to Mr. Spring. Mr. Spring has said that
15 -- he has indicated that he does not have sufficient assets
16 to meet a judgment if the Trustee were to prevail on his
17 whole case against him and --

18 THE COURT: How much are you seeking from him?

19 MR. MURPHY: I think --

20 THE COURT: I looked at the complaint. I couldn't
21 figure it out.

22 MR. MURPHY: I think in excess of \$40 million.
23 But with --even with respect to the (indiscernible), Your
24 Honor, which is about \$1.9 million in fictitious profits,
25 Mr. Spring has indicated he might not have sufficient assets

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1 reachable by the Trustee even to cover that.

2 THE COURT: So why don't you settle with him?

3 MR. MURPHY: We're in mediation.

4 THE COURT: You've been doing -- you've been at
5 this for a year, though.

6 MR. MURPHY: It's -- I haven't been directly
7 involved, Your Honor, but Judge Cyganowski has been
8 (indiscernible) apparently also and been with us in an
9 effort to do this. It's been a complex mediation and my
10 understanding is that it's in a very advanced stage. So at
11 this point, Your Honor, we would like the continuation of
12 the injunction to protect that. We -- parties don't need
13 the interference of the lifting of the injunction at this
14 point. Mr. Gross' FINRA statement of claim, essentially, is
15 not particularly specific.

16 THE COURT: But that's for FINRA to figure out. I
17 mean, obviously, he's alleging he was fraudulently induced
18 by the FINRA respondents to invest with BLMIS. That's the
19 substance of his claim, right or wrong. That's the way I
20 read it.

21 MR. MURPHY: I think the issue that we have with
22 it from all the prior caselaw that we have before Your Honor
23 in terms of injunctions and stating a specific,
24 individualized harm, I think that the FINRA statement of
25 claim doesn't do that. I'm not saying that it's not

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1 possible to state it but I'm saying that it doesn't meet
2 that standard.

3 THE COURT: Does any -- do you think the estate
4 has a fraud claim against Mr. Spring for represent -- for
5 inducing Mr. Gross to invest with BLMIS?

6 MR. MURPHY: We don't know the exact
7 representations that Mr. Spring --

8 THE COURT: Well, putting aside the merits of the
9 case, doesn't it look like it's got a direct claim that
10 these three respondents fraudulently induced him to invest
11 with BLMIS?

12 MR. MURPHY: He may, Your Honor. What we're
13 saying is that he may have a claim.

14 THE COURT: But you're saying that the automatic
15 stay precludes him from pursuing that claim because it's a
16 disguised derivative claim.

17 MR. MURPHY: That's correct. That's correct, Your
18 Honor. He is actually seeking -- he got his claims denied
19 by the Trustee.

20 THE COURT: I know what he's seeking, but he's not
21 entitled to, you know, what's set forth on the last
22 statement from these three.

23 MR. MURPHY: Well, that's correct, Your Honor, and
24 that's exactly our point.

25 THE COURT: But he might be entitled to lost

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1 interest. I realize he's a net winner, but if he has to pay
2 you back, then basically he's at zero after investing funds.
3 Why shouldn't he be entitled to lost interest or lost
4 opportunity cost from the people who defrauded him?

5 MR. MURPHY: If Mr. Gross can state a claim that's
6 independent of the Trustee's cause of action, then that's
7 his --

8 THE COURT: But he --

9 MR. MURPHY: -- that's his prerogative.

10 THE COURT: Okay. All right. I got it. David
11 Gross held two BLMIS accounts. He file customer claims, but
12 he was a net winner. The trustee denied the claims on that
13 basis and sued Gross to claw back the fictitious products.

14 On or about May 18, 2013, David Gross acting pro
15 se commenced an arbitration before FINRA against Cohmad
16 Securities Corp., the late Maurice Cohen, and Richard
17 Spring, collectively collectively the Respondents. The
18 FINRA complaint charged in substance that the Respondents
19 fraudulently induced Gross to invest with BLMIS. Gross
20 sought the amount set forth in his BLIMS account's last
21 statement, less an \$800,000 tax refund.

22 On August 26, 2013, Counsel for Cohmad and Cohn
23 filed answers in the FINRA arbitration, and a pre-hearing
24 conference was scheduled for November 18, 2013. Prior to
25 the commencement of the FINRA arbitration, the Trustee had

1 sued the Respondents and others to claw back fraudulent
2 transfers in the case Picard versus Cohmad Securities Corp.,
3 Adversary Proceeding number 09-01305.

4 Once notified of the FINRA arbitration in 2013,
5 the Trustee moved to enjoin it, asserting that the FINRA
6 arbitration violated the automatic stay, and the Court
7 should enjoin the FINRA arbitration under Bankruptcy Code
8 Section 105(a). Neither Gross nor his then-Counsel objected
9 to the motion, and on October 4, 2013, the Court granted the
10 motion under both theories and, hereinafter, the December
11 2013 order.

12 In the latter part of 2016, two of the three FINRA
13 Respondents, Cohmad and Cohn's Estate, settled with the
14 Trustee, leaving only Spring as both the Defendant in the
15 adversary proceeding and a Respondent in the FINRA
16 arbitration.

17 In January and February 2019, the Court received
18 submissions from Mr. Gross, in which he inquired as to the
19 status of the December 2013 order enjoining the FINRA
20 arbitration. After reviewing his request in light of the
21 post-2013 case law, the Court issued an order to show cause
22 on February 26, 2019, hereinafter the order to show cause,
23 directing the Trustee to show cause why the December 2013
24 order should not be reconsidered in light of the
25 settlements, and the Second Circuit's decision in Picard v.

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1 Fairfield Greenwich Limited, 762 F.3d 199 (2d Cir. 2014).

2 The Trustee filed a response. He admitted that
3 there was no need for a continuing injunction against Cohmad
4 and Cohn's Estate following their settlement with the
5 Trustee. As to Spring, however, he contended that Gross's
6 FINRA claim was a disguised derivative claim that violated
7 the automatic stay.

8 He also contended that permitting the FINRA
9 arbitration to proceed against Spring would have an
10 immediate adverse economic consequence to the Estate and
11 cause it irreparable harm. He explained that the parties to
12 the adversary proceeding had been engaged in a mediation for
13 approximately one year. The mediation is in an advanced
14 stage, and lifting the injunction would jeopardize its
15 chances for success.

16 In addition, Spring submitted a declaration
17 attesting that he does not have the resources to pay the
18 judgment if the Trustee recovers on his claim. And the
19 Trustee asserts that any recovery by Gross would impair his
20 ability to recover from Spring.

21 The December 2013 order is law of the case.
22 nevertheless, law of the case remains a matter of
23 discretion, and the Court may revisit an earlier decision
24 based on a intervening change of control in law, the
25 availability of new evidence, or the need to correct a clear

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1 error or prevent manifest injustice, U.S. v. Tenzer, 213
2 F.3d 34 Page 39, (2d Cir. 2000).

3 Here, an intervening change of law merits another
4 look at the legal principles that underlie the December 2013
5 order. The issues resolved by the December 2013 order were
6 addressed by the Second Circuit in the Picard v. Fairfield
7 Greenwich Limited, 762 F.3d 199, (2d Cir. 2014).

8 There, the Trustee sued to enjoin two pending
9 settlements between the New York Attorney General and class
10 representatives on the one hand, and Ezra Mirkin and certain
11 affiliates of his on the other. Mirkin ran a BLMIS feeder
12 fund, and the settlements related to lawsuits that arose out
13 of the activities in connection with the feeder fund and its
14 investments with BLMIS.

15 At the same time, the Trustee was suing Mirkin and
16 certain affiliates to claw back fraudulent transfers. The
17 two district courts dismissed the Trustee's declaratory and
18 injunction actions, and the Trustee appealed. The Second
19 Circuit first concluded that the civil actions brought by
20 the Attorney General and the Class Plaintiffs did not
21 violate the automatic stay ID 208 to 210.

22 The civil litigations did not implicate property
23 of the Estate because they were only factually likely,
24 rather than legally certain, to impact Estate property.
25 Further, they were not disguised fraudulent transfer claims

1 because they did not depend on BLMS's wrongful transfer of
2 its assets.

3 Instead, they alleged breaches of duties owed by
4 and fraudulent representations made by the Defendants, not
5 Madoff. In other words, they were direct claims, not
6 derivative claims.

7 The Second Circuit's reasoning supports the
8 conclusion that the FINRA arbitration does not violate the
9 automatic stay. Gross is asserting a direct claim based on
10 alleged fraudulent misrepresentations made to him by Spring,
11 not Madoff, and breach of Spring's independent duty.
12 Gross's claims did not depend on any wrongful transfers by
13 BLMIS or any harm to the estate, and the Trustee does not
14 contend that Spring's alleged misrepresentations to Gross
15 caused an injury to the Estate.

16 The fact that Gross is seeking the same monetary
17 relief in the FINRA arbitration that he unsuccessfully
18 sought from the BLMIS Estate does not transform his direct
19 claim into a derivative claim.

20 Finally, the FINRA claims were at most factually
21 likely, rather than legally certain to impact the Estate.
22 Accordingly, Gross's FINRA claim does not violate the
23 automatic stay. In *Fairfield Greenwich*, the Second Circuit
24 also rejected the argument that the Trustee was entitled to
25 enjoin the settlements because they would have immediate

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1 adverse consequences to the Estate or cause the Estate
2 irreparable harm, see ID at 211 to 13.

3 The fraudulent transfer actions had been pending
4 for more than four years, were still in active litigation
5 with no end in sight, and the Trustee did not have a
6 judgment to enforce against Mirkin's assets. The Trustee
7 had no statutory rights to Mirkin's assets because the
8 fraudulently conveyed property does not become property of
9 the Estate until it is recovered.

10 The Trustee's interest in Mirkin's assets was
11 contingent, and the Trustee had not shown that it was likely
12 as opposed to possible that he would win the fraudulent
13 transfer actions and be unable to collect the resulting
14 judgment because of the settlements.

15 Once again, the Second Circuit's reasoning compels
16 the conclusion that injunctive relief is unwarranted. The
17 purported harm alleged by the Trustee is the effect that the
18 FINRA arbitration will have on the Trustee's ability to
19 settle with and recover from Spring. The Trustee implies
20 that the settlement with Spring is imminent.

21 I will credit his statement, but note that the
22 mediation has been going on for approximately one year, and
23 the Trustee has not yet settled with Spring, and if he does
24 not, the recovery of any judgment is contingent on the
25 successful prosecution of its claim against Spring, which is

1 likely years in the future.

2 More important, unlike the imminent settlement
3 payments that the Trustee was trying to stop in Fairfield
4 Greenwich, Gross is nowhere near collecting anything from
5 Spring. The FINRA arbitration has been stayed for over five
6 years, and Gross's ability to collect from Spring is
7 contingent on his successful prosecution of the arbitration
8 and the subsequent entry of a money judgment.

9 If, as the Trustee states, the mediation is in an
10 advanced stage, any settlement with Spring will certainly
11 precede the resolution of the FINRA arbitration, and
12 ultimately, the entry of judgment against Spring. Thus, the
13 Trustee has failed to show that the continuation of the
14 FINRA arbitration will cause an immediate adverse economic
15 consequence within the meaning of Queenie v. Nygard to the
16 Estate, or irreparable harm to the estate under the
17 traditional formulation of a preliminary injunction.

18 Furthermore, the Trustee implies that the FINRA
19 complaint lacks merit. He contends that the allegations in
20 the FINRA complaint, "do not state a colorable claim that
21 Spring caused a bona fide, legally cognizable and
22 individualized injury to Gross." Trustee's memo at 19,
23 Accord note 75.

24 Obviously, the legal sufficiency or the FINRA
25 claim is for FINRA to decide, but if Gross cannot prove the

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1 Spring caused a direct injury based on a fraudulent
2 misrepresentation, Gross will never recover judgment against
3 Spring or threaten the Estate's ability to settle with and
4 collect in Spring. In short, a gross judgement that would
5 compete with the Trustee for Spring's limited assets is not
6 imminent, and there is no indication that Spring is prepared
7 to use his limited assets to settle with Gross.

8 Finally, the Trustee acknowledges that the Estate
9 no longer needs to enjoin the claims against Cohmad and
10 Cohen's Estate. Mr. Gross is 92 years old, and as a matter
11 of administrative efficiency and his own interests, Gross
12 should prosecute his arbitration against all of the
13 Respondents in one proceeding.

14 Accordingly, the Trustee is directed to submit a
15 proposed order vacating the December 2013 order on the
16 grounds that the FINRA arbitration, which seeks monetary
17 relief against Spring and the other respondents based on a
18 fraudulent misrepresentation made to Gross in connection
19 with his investment in BLMIS, or as an inducement to his
20 investment in BLMIS, does not violate the automatic stay or
21 cause the Estate an immediate adverse economic consequence
22 or irreparable harm. Okay?

23 Thank you. Mr. Gross, you'll be able to continue
24 with your arbitration. Okay, thank you.

25

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1 (Whereupon these proceedings were concluded at
2 10:48 AM)
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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

5 **Sonya Ledanski** Digitally signed by Sonya Ledanski
6 **Hyde** Hyde
7 DN: cn=Sonya Ledanski Hyde, o, ou,
email=digital@veritext.com, c=US
Date: 2019.03.28 16:34:08 -04'00'

8 Sonya Ledanski Hyde

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20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

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25 Date: March 28, 2019

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